IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

REPLY BRIEF OF RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, among the respondents in the above-entitled case, submit this brief to the Court in reply to the brief filed by the United States as *amicus curiae.*

I

THE RES JUDICATA ASPECTS

The *amicus* brief (page 6) correctly states that the District Court dismissed all claims against the respondent Local Unions on *res judicata* grounds. However, such brief (page 6 and footnote 3) incorrectly states that the Court of Appeals did not address itself to respondents' *res judicata* contentions, that the union respondents assert *res judicata* here as an alternative ground for affirming the judgment below, and that since the *res judicata* issue was not decided by the Court of Appeals, this Court could remand that issue for consideration if the tolling question is decided in petitioner's favor.[1]

The Court of Appeals did not address itself to the *res judicata* aspects of the case in its original decision because it found a lack of jurisdiction (105a-113a). However, that Court did address itself to the issue on the petition for rehearing. In its opinion on that petition, footnote 1 (115a), the Court of Appeals stated as follows:

> "We agree with the District Court that the unions have a complete defense on the grounds of *res judicata,* and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned."

Moreover, the Local Unions did not, as the *amicus* brief states, urge in their own brief *res judicata* as an alternative ground for affirming the judgment below. The Local Union respondents addressed themselves in

[1] The *amicus* brief also states in footnote 3 that the United States takes no position on the merits with respect to *res judicata.*

their brief to this Court on the *res judicata* aspects of the case only because the petitioner's brief (page 8) requested this Court to remand the *res judicata* issue to the Court of Appeals for reconsideration and clarification. The brief of the Local Unions pointed out that the petition for a writ of certiorari in the present case requested this Court to review the ruling of the Court below affirming the dismissal of the petitioner's claims under both statutes against the unions on the grounds of *res judicata*, and that this Court did not grant the request. No petition for rehearing with respect thereto was filed by petitioner. The Local Unions, therefore, took the position in their brief (page 12) that the denial by this Court of the petition for certiorari on the *res judicata* issue constitutes a final judgment in the case in favor of the respondent unions and there is now no issue before this Court which can be remanded to the Court of Appeals with respect to these local unions regardless of what decision the Court may make with respect to the tolling issue.

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[2] There are also other inaccuracies in the statement of facts in the *amicus* brief. On page 5 the *amicus* brief states that the Commission's conciliation efforts failed to bring respondents into voluntary compliance and that in January 1971 the Commission accordingly issued petitioner a right-to-sue notice and that petitioner brought suit pursuant to this notice. The record does not show what, if any, efforts the Commission undertook with respect to conciliation. On page 6 the *amicus* brief states that petitioner was unable to obtain an attorney within the 30 days allowed him by the District Court's order of January 14, 1972. The record does not show what, if anything, petitioner did during these 30 days to obtain counsel. It shows only that on February 17, 1972, attorney William E. Caldwell wrote to the District Court advising, among other things, that petitioner had contacted him regarding representation (45a).

II

THE TOLLING ISSUE

The *amicus* brief argues that an applicable state statute limiting the time within which an action may be brought under Section 1981 of Title 42 of the United States Code should be tolled by the filing and pendency of a Title VII charge before the Federal Equal Employment Opportunity Commission because such a result serves the Congressional objective of conciliation and premature judicial intervention without offending the policies underlying statutory limitations.

The record does not support the conclusion that the application of the tolling principle in the present case serves any such Congressional objective because there is no record with respect to EEOC conciliation efforts. Moreover, as applied to future actions the argument is a theoretical one made without regard to the realities of the situation as set forth in the brief of the Local Union respondents.

The entire *amicus* brief is predicated on the assumption that the purposes of Title VII are, if at all possible, to conciliate discrimination disputes and avoid Court actions. Although the desirability of conciliation undoubtedly helped to mold Title VII, the fact is that the statute itself comes very close to totally shooting down conciliation by the provision that a right-to-sue letter may be obtained after 180 days even if no conciliation has been undertaken. This is particularly true in light of the fact (*amicus* brief page 10) that because of a large backlog of cases and limited budget, the EEOC often is unable to initiate compliance efforts ever within the limitation periods of state statutes of limitations. The *amicus* brief argues that, because of this fact, unless the running of the state stat-

ute is tolled with respect to Section 1981 by the filing of a discrimination charge with the EEOC, many aggrieved individuals would be compelled to bring suit prematurely under Section 1981 and thereby risk disruption of conciliation efforts. However, the combination of the Congressional action in permitting a suit within 180 days without conciliation plus the inability of the EEOC to act within the period of state statutes of limitations (usually one to three years) has created strong incentives for aggrieved individuals to bring suit without any conciliation efforts. The situation set forth by the *amicus* brief, therefore argues strongly against the tolling principle rather than in support of it. The argument of the *amicus* brief that the policy of Title VII in favor of voluntary resolution of employment discrimination claims should be accommodated by application of the tolling principle is, as a practical matter, substantially meaningless.

The *amicus* brief also argues that the application of the tolling principle in this situation would not offend policies underlying statutory limitation periods. Again, this argument is made almost in a total vacuum without any regard to realities. The *amicus* brief contends that the timely filing of a Title VII charge promptly puts respondents on notice with respect to a discrimination claim. While an EEOC notice does indicate that there is a claim, such a notice provides no details. Moreover, there is no guarantee of even such a sparse notice because Federal Courts have held in the decisions cited at page 15 of the respondent unions' brief that the EEOC does not have to serve the respondent with such a notice prior to the institution of a Title VII suit. The cases cited by the union respondents show that a defendant may not even know

there is a discrimination claim until suit is filed against him in Court, much less the substance of the claim.[3] Thus, defendants are and can be surprised and prejudiced by delay in the institution of a civil action pending EEOC action or inaction. In the realities of the situation either one of two things will occur. The plaintiff may request a right-to-sue notice on the 181st day after the filing of the charge on shortly thereafter so that the Title VII provisions have served no purpose other than the mechanical one of filing the charge, or the plaintiff may sit and wait for conciliation which may never come because of governmental inadequacy. As a consequence, the suit which is finally filed without conciliation may very well be filed years after the claimed discrimination. Thus, a defendant may be litigating matters which occurred years before. In the present case, the original charge was filed on May 31, 1967 (15a), and referred to alleged discrimination substantially prior thereto and the original complaint was not filed in Court until March of 1971. Even in 1971 defendants would have been litigating charges many years old. This situation is bad enough as applied to Title VII actions and it creates a very strong reason why the tolling principle should not be applied to Section 1981 actions with respect to EEOC charges. The application of such principle will not aid conciliation if the plaintiff promptly asks for a right-to-sue letter and it will completely defeat the purposes of the statutes of limitations against litigating stale claims if

[3] BRAC is a party to just such a case now pending before the United States District Court for the Eastern District of Virginia (*Coleman* v. *Seaboard Coast Line Railroad, et al.* (Civil Action No. 173-73-R)), wherein it learned of a claim when the complaint was filed. The District Court agreed with the cited cases and, among other things, refused to remand for conciliation.

the plaintiff waits for conciliation which never comes. The *amicus* brief in arguing that the application of the tolling principle would not defeat the purposes of statutes of limitations, did not address itself at all to this problem.

Equities are obviously a two-way street. There is no equity for defendants who can be victims of frivolous discrimination claims in basing the law upon a theoretical principle of conciliation by the Federal Commission when the statute and the realities of administration make conciliation difficult if not impossilbe. Nor is there any merit to an argument that equitable considerations weigh in favor of a plaintiff who has made timely assertion of his rights in a manner that puts a defendant on notice and allows him to protect himself from prejudice when the realities of the situation are that in practice it does not do so.

CONCLUSION

It is respectfully submitted that the *amicus* brief does not demonstrate any basis for granting the relief requested by the petitioner nor does it even address itself to the substantial real problems that are involved.

Respectfully submitted,

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